No. 98-336

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1998

Joe B. Ritchey,

Petitioner,

v.

The Upjohn Company and William Dement,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Ninth Circuit

MEMORANDUM REPLY TO RESPONDENTS ' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL D. MOSHER
ROBERT S. CATZ
Counsel of Record
50 North Main Street
Paris, Texas 75460-4250
(903) 785-4721

Counsel for Petitioner

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PETITIONER'S MEMORANDUM REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents' consolidated joint opposition to certiorari offered up to the Court with seemingly little force and conviction simplistically characterizes the Ninth Circuit's decision as nothing more than the mere "application of [California] law to the unusual facts of this case" attempts to mask the importance of the grant of review in this case.

1. As the Court knows, the Ninth Circuit comprises 15 separate judicial districts in which the ***Ritchey*** rule now requires the district courts to conduct full and expanded plenary review of the merits of all diversity removal petitions seeking remand on nothing more then the mere allegation of fraudulent joinder of non-diverse state defendants in state court even though more than one year has passed since the action was commenced in state court.

The ***Ritchey*** rule, by authorizing the piercing of a state court plaintiff's pleadings to reach the full merits of the state court claims against the state resident defendants, also allows federal courts to enter orders of involuntary dismissal against all state resident defendants, by invoking not narrow but full subject matter juridiction of the case in its entirety by improperly adjudicating all claims as to all parties.

This remarkable holding is contrary to the most reasonable interpretation of 28 U.S.C. §1446(b) and the legislative history accompanying the 1988 amendments to the Act in which the initial pleading in state court appears on the face of the complaint alleges causes of action against state resident defendants, when involuntary orders of dismissal of the state resident defendants, could and should be entered by the state court in the first instance, where upon any remaining diverse defendants could then seek removal, so long as the one year time limit mandated by Congress has not yet expired. The legislative history of the 1988 amendments supports this view and is fraught in the congressional deliberations acknowledging that the one year time limit might well be

manipulated through fraudulent joinder by plaintiffs forum shopping to secure some perceived tactical advantage. The Ninth Circuit's result is in direct conflict with the intent of Congress and the underlining policies and purposes of the Act.

By holding that fraudulent joinder diversity removal petitions fall under the first paragraph and not the second paragraph of 28 U.S.C. §1446 (b), the Ninth Circuit has effectively ruled that no other time limit other than the 30 day limit in the first paragraph applies to diversity removal based on fraudulent joinder claims, no matter how much progress has been made in state court, and regardless of how much time has passed since commencement of the action in state court, a diverse defendant, within 30 days after service in state court, may simply allege fraudulent joinder and remove more than one year after the case commenced in state court. This result was not and could not have been intended by Congress when it enacted the 1988 amendments to rhe Act.

Instead of the expansionist interpretation by the Ninth Circuit, which increases the already ever burgeoning case load of the federal judiciary, it is much more likely then not that the 100th Congress intended the more reasonable and likely construction that diminishes the federal court burden --- that all state court complaints, which on their face clearly lack complete diversity of citizenship of the parties, remain in state court until some state court event results in "receipt by the [remaining complete diverse] defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper ..." upon which a claim of complete diversity removal could then be bottomed, and then *only* if that jurisdictional event ensues in state court within the one year time limit imposed by Congress in the 1988 amendments to the Act. Petitioner's interpretation of 28 U.S.C. § 1446(b) as amended clearly comports with the unambigous desire by the l00th Congress to abolish diversity removal altogether by recognition that state courts are far better suited to adjudicate issues of fraudulent joinder since, such a claim in state court would be adjudicated in

due course only after factual and legal determinations are advanced by the parties following discovery on the basis of state procedural and substantive law.

The ***Ritchey*** rule is thus contrary to the more sound and reasoned interpretation of the 1988 amendments to the Act, when the legislative history is taken into account, which curiouly the Ninth Circuit refused to even examine, weigh or consider, along with the thoughtful jurisprudence developed by the overwhelming number of district court opinions[1], which now exceed more than thirty-five in number regarding remand orders beyond the one year limitation, which are final yet unreviewable by express Act of Congress under 28 U.S.C § 1447(d). Because district court remand orders to state court cannot not be appealed, the likelihood of a clear resolution of the one year time limitation on diversity removal based upon claims of fraudulent joinder may evade judicial review in other circuits for some time to come, as has been the case since Congress debated complete elimination of diversity jurisdiction altogether more than ten years ago which resulted in the 1988 amendments, a legislative outcome reflecting a compromise between Senate and House conferees which avoided and perhaps delayed for another day the possible outright abolition of diversity jurisdiction.

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1. As noted in our petition at page 11 the Court in ***Caterpillar, Inc. v. Lewis***, 519 U.S. 61,117 S.Ct. 467,473 (1996), *which the respondents so conveniently ignore* in their joint brief in opposition, while the Third and Eleventh Circuits in ***Singh v. Daimler-Benz***, 9 F.3rd 303, 309 (3rd Cir.1993) and ***In re Uniroyal Goodrich Tire Co.***, 104 F.3d 322, 323(11th Cir.1997) have rightfully assumed without analysis the one year rule on diversity removal is absolute. See Givens, *Manual of Federal Practice*, 5th Ed. (Lexis Law Publishing 1998), Diversity Removal, page 257, concludes as well. However, ***New York Life Insurance Co. v. Deshotel,*** 142 F.3d 873 (5th Cir.1998) decided on June 1, 1998 is in accord with ***Ritchey***.

Review by this Court is necessary to resolve the continued judicial uncertainty and confusion regarding what Congress actually intended in 1988 when it amended 28 U.S.C. § 1446(b) by adding the one-year limitation period on diversity removal.

2. Review by this Court is appropriate for another equally compelling reason. The Ninth Circuit, in authorizing federal court involuntary dismissal in diversity removal cases based on a claim of fraudulent joinder has done extreme violence to the underlying principles of federalism by impermissibly divesting the rights of the sovereign state courts to adjudicate the application of their own rules regarding statute of limitations, issue and claim preclusion, fraudulent concealment, deceit, mispresentation and other conspiracies undertaken by jointly liable tortfeasors, claims that by the very nature of the factual elements alleged ordinarily toll the statute of limitations and would not, as new and independent actions arising under state substantive law be subject to dismissal on the basis of issue or claim preclusion.

Under Article III of the United States Constitution, a state court original pleading which properly alleges valid causes action against non diverse defendants arising under state substantive law, one that is presented in good faith and that asserts viable new causes of action and colorable non-frivoulous claims arising under state law on the face of the complaint, should preclude immediate removal in the first instance *until* the state court determines that the defenses of the statute of limitations or claim and issue preclusion should be sustained in favor of the non diverse defendants. This procedural approach and sequence of adjudication is entirely consistent with the views of the Judicial Conference of the United States Courts as expressed in a 1995 report:

Given the difficulties federal judges frequently encounter in

> predicting state substantive law and the unavoidable intrusion of the federal courts in this lawmaking function of the state courts, theoretical justifications for diversity jurisdiction are extremely weak in comparison to other areas of federal court activity.

"Long Range Plan for Federal Courts" at page 31.

In sum, given the weighty policy considerations confronted by the 100th Congress when it pondered and adopted the more restrictive 1988 amendments to 28 U.S.C. § 1446(b), a federal court should, when faced between two apparently reasoned interpretations of a diversity removal statute, where one statutory construction lessens the burden of the exponential increase in diversity case loads while at the same time yielding back sovereignty to the state courts to apply its own substantive state law, the federal courts should choose the interpretation that confines diversity removal and federal jurisdiction narrowly, and factors and results in an appropriate deference to states rights underlying "our federalism".

For the foregoing reasons and for the reasons stated in the petition for writ of certiorari, the Court should grant review on the important questions presented herein which affect the very fabric of the federal judiciary and its relationship to state court sovereignty.

Respectfully submitted,

Michael D. Mosher
Robert S. Catz
50 Main Street
Paris, Texas 75460-4250
(903)785-4721

Counsel for Petitioner

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